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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 306

THE ASSOCIATED PRESS, *Petitioner,*

—against—

EDWIN A. WALKER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF LOUISIANA

Petitioner respectfully prays that a writ of certiorari issueto review the judgment of the Court of Appeal, Second Circuit, State of Louisiana, which was entered in this action on October 31, 1966, or, in the alternative, to review the order and judgment of the Supreme Court of Louisiana by which that court, on February 3, 1967, refused to issue a writ of certiorari or review.

CITATIONS TO OPINIONS BELOW

The unreported opinion and the order of the First Judicial District Court, Caddo Parish, Louisiana, dated December 11, 1963, sustaining Petitioner's exception of improper venue, are printed in Appendix B, pp. 5a-11a.

The opinion of the Louisiana Court of Appeal, Second Circuit, reversing the order of the First Judicial District Court, Caddo Parish, Louisiana, and overruling the excep-

tion dated February 13, 1964, reported at 162 So. 2d 437, is printed in Appendix B, pp. 12a-22a. Rehearing was denied on April 13, 1964. *(Ibid.)*

The memorandum of the Supreme Court of Louisiana, dated June 8, 1964, refusing Petitioner's application for a writ of certiorari or review with respect to the issue of venue, reported at 246 La. 374, 164 So. 2d 360, is printed in Appendix B, p. 23a.

The memorandum of this Court dismissing Petitioner's appeal on the venue motion for want of jurisdiction and denying certiorari, dated November 16, 1964, is reported at 379 U. S. 47, and is printed in Appendix B, p. 24a.

The opinion of the Court of Appeal, Second Circuit, State of Louisiana, on the merits, dated October 31, 1966, reported at 191 So. 2d 727, is printed in Appendix B, pp. 25a-51a.

The memorandum of the Supreme Court of Louisiana, dated February 3, 1967, reported at 250 La. 98, 194 So. 2d 97, is printed in Appendix B, p. 52a.

JURISDICTION

The judgment of the Court of Appeal, Second Circuit, State of Louisiana; was entered on October 31, 1966 (Appendix B, pp. 25a-51a). An application for rehearing was denied on November 29, 1966 (*Ibid.*).

Petitioner's application to the Supreme Court of the State of Louisiana for a writ of certiorari or review was denied on February 3, 1967 (Appendix B, p. 52a).

By order of Mr. Justice Black dated March 31, 1967, the time within which Petitioner was permitted to file a petition for writ of certiorari to this Court was extended to and including July 3, 1967.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the judgment of this Court in *The Associated Press* v. *Walker* (October Term, 1966, No. 150) requires summary reversal of the judgment below on the ground that such judgment below deprives Petitioner of the freedoms of speech and press guaranteed to it by the First and Fourteenth Amendments to the Federal Constitution.

2. Whether the judgment below deprives Petitioner of the freedoms of speech and press guaranteed to it by the First and Fourteenth Amendments to the Federal Constitution.

3. Whether the record in this case on the issues of "actual malice," "substantial truth" and "fair comment" is so lacking in evidentiary support for the judgment below that said judgment constitutes a denial of due process in violation of the Fourteenth Amendment to the Federal Constitution and deprives Petitioner of the freedoms of speech and press guaranteed to it by the First and Fourteenth Amendments to the Federal Constitution.

4. Whether the conduct of the trial below, including appeals to racial, religious, political and sectional prejudice, denied to Petitioner a fair trial in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

5. Whether the construction and application of Article 74 of the Louisiana Code of Civil Procedure in this case, under which venue was fixed in Caddo Parish, Louisiana, violates the First and Fourteenth Amendments to the Federal Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Amendment I and Amendment XIV, Section 1, to the United States Constitution; Article I, § 3, Article I, § 6, and Article XIX, § 9, of the Louisiana Constitution; Article 2315 of the Louisiana Civil Code, first sentence; Article 74 of the Louisiana Code of Civil Procedure; Title 13, § 3602 of the Louisiana Revised Statutes; and Title 14, §§ 47, 48 and 49 of the Louisiana Revised Statutes, the texts of which are reprinted in Appendix A, pp. 1a-4a.

STATEMENT OF THE CASE

Ordinarily, the decision of this Court in *The Associated Press* v. *Walker* (October Term, 1966, No. 150) (hereinafter referred to as "the Texas case") would have disposed of the principal constitutional issues here presented, and would have provided the basis for a judgment dismissing this action in the courts below. But here, although the Louisiana Court of Appeal knew that this Court had granted certiorari in the Texas case, the Louisiana court declined to withhold decision pending the decision of this Court. Instead, at the urging of Walker's counsel, the Court of Appeal rendered a decision awarding the General $75,000. Thereafter, on February 3, 1967, shortly before the Texas case was argued in this Court, the Supreme Court of Louisiana denied Petitioner's application for certiorari or review. Consequently, under Louisiana law, any further proceedings relating to Petitioner are now foreclosed and, if Petitioner is to obtain relief from the patently unconstitutional judgment below, that relief can come only from this Court.

This case involves news dispatches, essentially the same as in the Texas case, which were disseminated by Petitioner and which concerned the activities of General Walker during the riots which occurred on the campus of the University of Mississippi throughout the night of September 30, 1962.

As in the Texas case, the statements which here constitute the gravamen of General Walker's claim are:

> 1. That General Walker assumed command of the crowd which was rioting to prevent the admission of James Meredith to the University of Mississippi; and
>
> 2. That General Walker led a charge of students against the Federal marshals who were on the campus to enforce the mandates of the Federal Courts directing Meredith's admission.*

The factual issues presented by the record in this case do not differ in any material respect from those in the Texas case. As Respondent's counsel represented below, "the parties, the subject matter and the evidence [in both cases] were *identical* . . . ." (Plaintiff's Original Brief in the Court of Appeal, State of Louisiana, p. 79) (emphasis supplied).

The dispatches here sued upon were published by Petitioner's co-defendant, The Times-Picayune Publishing Company, in two New Orleans newspapers, the Times-Picayune and the New Orleans States-Item. Fewer than

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*Nowhere in the pleadings does Respondent identify the specific dispatches sued upon. At pre-trial, however, Respondent's claim was limited to the four dispatches which appeared in the newspapers published by Petitioner's co-defendant, The Times-Picayune Publishing Corporation (Pl. Exh. 3, 17, 20, and 23), the relevant portions of which are reprinted as Appendix D.

300 copies of these newspapers were circulated in Caddo Parish, where Respondent chose to bring this suit (Pl. Exh. 36). Yet the Louisiana appellate courts held that venue was proper in Caddo Parish with respect to all damages claimed to have been sustained by Respondent in Louisiana and elsewhere, even though the principal injury, if any, must necessarily have occurred in New Orleans, more than 300 miles away.

The trial itself was replete with appeals to the racial, religious, political and sectional prejudice of the Caddo Parish jury.

At the outset of the trial, for example, Respondent elicited testimony from the witness Sweat that the cause of the Oxford riots was the "insult" to the student body resulting from the use of "nigger" truck drivers to transport Federal marshals to the campus of the University (R. 936).

Throughout the trial, the Court permitted extensive, irrelevant and highly prejudicial testimony concerning General Walker's arrest and imprisonment and the consequent judicial proceedings (R. 1520-1564, 1591-1613, 1885-1887, 2518-2520, 2523-2530, 2604-2614, 2724-2734), even though the General had expressly waived any claim for damages resulting therefrom (R. 260).

With no foundation in fact, and obviously to create prejudice, a number of Petitioner's reporters, among others, were asked whether they were acquainted with or had contact with Martin Luther King, CORE, SNNC, or other integration groups (R. 2505, 2628, 2644, 2654). There were also references by Walker or his counsel to Freedom Riders (R. 1445, 2093), the Watts riots (R. 2015-2016), a Communist conspiracy to smear Walker (R. 2011, 2014, 2629-2630) and the emotionally charged subject of miscegenation (R. 1778, 2735-2736).

The prejudicial atmosphere of the trial carried forward into the summation of Walker's counsel, who called for "retribution" of at least $1,250,000 (R. 382-384), although Louisiana does not permit punitive damages in civil actions.* Respondent's counsel buttressed his appeal for "retribution" by announcing that any recovery by General Walker would go to aid the cause of anti-communism (R. 401). This announcement, incidentally, was greeted by tumultuous applause which the trial court itself characterized as a "demonstration" (R. 385).**

In such an atmosphere, it is not surprising that the jury brought in a verdict of $3,000,000 even though General Walker's complaint had demanded only $2,250,000.***

Petitioner submitted to the trial court a number of requests to charge which were based upon *New York Times Co.* v. *Sullivan* (R. 332, 333, 337-339). All these requests were denied (R. 392-393). Instead, the trial court charged the jury:

> "The publication of a libelous statement with respect to matters of public interest and general concern even though the libelous statement is false is privileged as a matter of law unless the statement was published with malice. *Malice is either ill will or reckless disregard of the truth.*" (R. 388) (emphasis supplied)

On the basis of this charge, the jury found that the statements complained of had been published with "malice."

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*See, *e.g.*, *Gugert* v. *New Orleans Independent Laundries, Inc.*, 181 So. 653, 656 (La. Ct. App. 1938) (not officially reported); *Hebb* v. *Codifier & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926); *Brian* v. *Harper*, 144 La. 585, 589, 80 So. 885, 887 (1919); *Universal C. I. T. Credit Corp.* v. *Jones*, 47 So. 2d 359, 363 (La. Ct. App. 1950) (not officially reported).

**This was one of three demonstrations in favor of General Walker which occurred in the course of the trial (R. 402).

***The trial court thereafter reduced the judgment to the amount demanded (R. 397, 398).

This finding, however, was grounded on a definition of "malice" inconsistent with the definition of "actual malice" prescribed by this Court. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280; *Garrison* v. *Louisiana*, 379 U. S. 64, 73; *Henry* v. *Collins*, 380 U. S. 356; *Rosenblatt* v. *Baer*, 383 U. S. 75, 77.* Consequently, as this case came to the Louisiana Court of Appeal, there was no jury finding of "actual malice" to support the verdict, if the *New York Times* doctrine applied.

The Court of Appeal, however, avoided the problem presented by the inadequate charge on malice and indeed the entire *New York Times* issue by holding (R. 2778):

> "It is our position that plaintiff furnished satisfactory proof to the jury and to this court that the libelous statements were made with "actual malice", * * * that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' "

The statement of the Court of Appeal that Respondent had satisfied the jury on the issue of "actual malice" is obviously incorrect, since that issue was never submitted to

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*In *Garrison* v. *Louisiana*, this Court held (379 U. S. 64, 73):

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.' "

And in *Henry* v. *Collins*, this Court reversed a judgment for the plaintiffs because "the jury might well have understood these instructions to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood." (380 U. S. 356, 357)

the jury under appropriate instructions. As to the statement that Respondent had established actual malice to the satisfaction of the Court of Appeal, the only reason given for this startling finding—a finding directly contrary to the findings of this Court and of the Texas courts—was as follows (R. 2779):

> "It is significant that the words complained of related to actions and conduct which were represented as positive statements of fact personally observed. As so reported there can be no real basis for mistake or error honestly made therein. The statements were either false or true and knowingly represented as such. Forasmuch as falsity has been proven to the jury and to this court, we are impelled to the conclusion that the representations were made with knowledge of their falsity or with reckless disregard for the truth. We therefore find that the words were libelous, per se, and made with actual malice."

This theory, which was repeatedly but unsuccessfully urged in this Court in the Texas case,* was the keystone upon which the Louisiana Court of Appeal affirmed the trial court as to liability.**

The Court of Appeal, however, recognized that there was no possible justification for an award of $2,250,000 and accordingly reduced the judgment to $75,000 (R.

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*Reply to Supplement to Petition for Writ of Certiorari, pp. 2-3, 4; Respondent's Brief, pp. 27, 35; Respondent's Answer to Amicus Brief of the Tribune Company, p. 13.

**The Court sloughed off all arguments with respect to the prejudicial nature of the proceedings in the trial court by announcing that, under Louisiana law, it was entitled to review the facts as well as the law and could thus correct the errors of the Court below (R. 2780).

2790). A petition for rehearing was thereafter duly filed (R. 2791-2795) and promptly denied (R. 2862).

Petitioner and its co-defendant thereupon applied to the Supreme Court of Louisiana for a writ of certiorari or review (R. 2870-2951, 2955-2982). Although the petition of the Times-Picayune was granted with respect to an issue not here relevant, Petitioner's application was denied (R. 3002).

As of February 3, 1967, therefore, all proceedings in Louisiana with respect to Petitioner were at an end. So far as Petitioner is concerned, the judgment in Louisiana is final, and any relief must come from this Court.

Petitioner raised its Federal Constitutional claims at every stage of the proceedings below: in Special Pleas of Unconstitutionality (R. 67-68, 251-252); on appeal to the Louisiana Court of Appeal (R. 120-123); on application for certiorari to the Louisiana Supreme Court on the issue of venue (R. 163-167); on appeal to this Court on the issue of venue (Jurisdictional Statement, *passim*); in its Answer (R. 269-280); in its Supplemental and Amended Answer (R. 325-327); in its requests for instructions to the jury (R. 331-333, 337-339); in its exceptions to the charge of the trial court (R. 391, 392-393); in its motion for a new trial (R. 399-408, 410-413); on appeal from the judgment on the merits to the Louisiana Court of Appeal for the Second Circuit (Asg. Err. 1, 2, 3, 4, 5, 7); on application for rehearing in that Court (Asg. Err. 5, 6, 7, 8, 11); and in its petition for certiorari or writ of review to the Supreme Court of Louisiana (Asg. Err. 2, 3, 5, 6, 8, 10 and 11).

REASONS FOR GRANTING THE WRIT

1. This Court has just held unanimously that the First Amendment precludes Respondent from collecting any damages whatsoever from Petitioner with respect to the very statements upon which Respondent's present claim is based. The judgment below, however, awards Respondent $75,000 in damages on a record concededly "identical" in all material respects to the record which was before this Court in the Texas case.

In the Texas case, all nine members of the Court found, upon their own examination of the record, that there was no evidence of "actual malice."

As stated by Chief Justice Warren:

> "I have no difficulty in concluding that No. 150, *The Associated Press* v. *Walker*, must be reversed since it is in clear conflict with *New York Times*. The constitutional defenses were properly raised and preserved by the petitioner. The trial judge expressly ruled that no showing of malice in any sense had been made, and he reversed an award of punitive damages for that reason. The seven members of this Court who reach the question agree with that conclusion, and all agree that the courts below erred in holding the First Amendment inapplicable."*

Mr. Justice Harlan, speaking for four members of the Court, said:

> "In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. The Associated Press received the information from a correspondent

*Justices Black and Douglas specifically concurred in this portion of Chief Justice Warren's opinion, thus making the finding unanimous.

> who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this instance, with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy. Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards. We therefore conclude that General Walker should not be entitled to damages from the Associated Press." [footnote omitted]

The Louisiana judgment is thus in direct and irreconcilable conflict with the decision of this Court, and, if Petitioner's First Amendment rights are to be vindicated, that judgment must be reversed, with directions to enter judgment for the Petitioner.

2. The finding of "actual malice" by the Louisiana Court of Appeal cannot be constitutionally sustained. Although, in the Texas case, the trial court and the Court of Civil Appeals had already held that there was no "actual malice," no attempt was made by the Court of Appeal to justify its finding on the basis of any factual differences between the records in the two cases. Instead, the Louisiana Court simply applied the label "actual malice" to facts which this Court has held do not constitute "actual malice." The State of Louisiana cannot, we submit, deprive Petitioner of its constitutional rights through so patent a device. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 283-84; *NAACP* v. *Button*, 371 U. S. 415, 429; *Wood* v. *Georgia*, 370 U. S. 375, 386; *Craig* v. *Harney*, 331 U. S. 367, 373; *Norris* v. *Alabama*, 294 U. S. 587, 590. The decision of this Court in the Texas case on the issue of "actual malice" is

controlling and conclusive of that issue here. Petitioner respectfully urges, therefore, that certiorari be granted and the judgment below summarily reversed. *DeVries* v. *Baumgartner's Elec. Const. Co.*, 359 U. S. 498, *rehearing denied*, 360 U. S. 923; *United States* v. *Haley*, 358 U. S. 644, *rehearing denied*, 359 U. S. 981; *United States* v. *Hulley*, 358 U. S. 66.

3. There is no more support for a finding that the statements here complained of were untrue and did not constitute fair comment than there is for the finding of "actual malice." To award Respondent $75,000 in damages where there is no evidence establishing the underlying cause of action is an obvious denial of due process which, in the circumstances of this case, requires the intervention of this Court. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87; *Garner* v. *Louisiana*, 368 U. S. 157; *Thompson* v. *Louisville*, 362 U. S. 199.

4. Applicable decisions of this Court make it clear that the prejudicial conduct of the trial below constituted a clear denial of due process. *Turner* v. *Louisiana*, 379 U. S. 466, 471-2; *Irvin* v. *Dowd*, 366 U. S. 717; *In re Murchison*, 349 U. S. 133, 136; *New York Cent. R. R.* v. *Johnson*, 279 U. S. 310.

These errors were not cured on appeal merely because the Louisiana Court of Appeal purported to review the facts as well as the law. Under Louisiana law, the Court of Appeal does not review the facts *de novo*, *Jones* v. *Jones*, 232 La. 102, 93 So. 2d 917 (1957); *Rosenthal* v. *Gauthier*, 224 La. 341, 69 So. 2d 367 (1953); *Johnson* v. *Houston Fire & Cas. Co.*, 66 So. 2d 528 (La. Ct. App. 1953), and a jury's findings control unless "manifestly erroneous," *Roberts* v. *Radalec, Inc.*, 222 La. 831, 64 So. 2d 189 (1953); *Smith* v. *Clemmons*, 48 So. 2d 813 (La. Ct. App. 1950); *Flowers* v. *Morris*, 43 So. 2d 917 (La. Ct. App. 1950).

Any error which taints a finding made at the trial court level must necessarily affect the subsequent review of such findings. Since the findings here at issue resulted from a trial replete with violations of due process, the resulting judgment cannot constitutionally be permitted to stand. *Cf. Jackson* v. *Denno*, 378 U. S. 368, 379-381.

5. As construed by the Louisiana appellate courts, Article 74 of the Louisiana Code of Civil Procedure permits the plaintiff in a libel action to try his case in any parish where even a single copy of the publication in question has been circulated. The decision below, sustaining the statute as thus construed, is in direct conflict with decisions of the Supreme Court of Missouri holding such a provision unconstitutional as a violation of due process. *Houston* v. *Pulitzer Publishing Co.*, 249 Mo. 332, 155 S. W. 1068 (1913). As the Supreme Court of Alabama said in *Age-Herald Publishing Co.* v. *Huddleston*, 207 Ala. 40, 45, 92 So. 193, 198 (1921):

> "We do not see how there can be any conflict of opinion as to the unfairness, injustice, or impolicy of permitting aggrieved persons, in this class of cases only, to select at their pleasure any judicial forum within the state where the political, religious, industrial, moral, or personal predilections of the local citizenship may readily furnish a jury whose biased views will probably be reflected, however sincerely, in a verdict favorable to them."

Accord: Forman v. *Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943); *O'Malley* v. *Statesman Printing Co.*, 60 Idaho 326, 91 P. 2d 357 (1939).

The strategy employed by General Walker in bringing most of his suits in forums which would naturally be sympathetic to his point of view has here been furthered by a

statute authorizing him to select a place of trial, in such a forum, which has no substantial connection with any of the issues or parties. Obviously, the General was thus able to seek and find a jury before whom he could do no wrong.

Whether state libel laws can, consistent with the First and Fourteenth Amendments, authorize a libel plaintiff to make such a choice is a question upon which state courts are in conflict and which has not yet been, but should be, resolved by this Court.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment below summarily reversed, with directions to enter judgment for Petitioner.

Respectfully submitted,

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